Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

TIM REISCH, *et al.*,

*Cross-Petitioners,*

v.

CHARLES E. SISNEY; JAMES DEAN VAN WYHE;
AND UNITED STATES OF AMERICA,

*Cross-Respondents.*

On Cross-Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

## Conditional Cross-Petition for a Writ of Certiorari

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## QUESTION PRESENTED

1. Whether federal spending for state prisons violates the "general Welfare" limitation of the Spending Clause, and this Court's precedent in *United States v. Butler* and *South Dakota v. Dole*, because it constitutes spending for local, rather than national purposes, and because it intrudes upon the states' police power, which is a core function of government, traditionally reserved to the states?

## List of Parties

Cross-Petitioners: In their individual and official capacities, Tim Reisch, Secretary of Corrections for South Dakota; Douglas L. Weber, Chief Warden for the Department of Corrections of South Dakota; Dennis Bock, Associate Warden for the South Dakota State Penitentiary; Jennifer Wagner a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; and Daryl Slykhuis, Interim Warden for the South Dakota State Penitentiary.

Cross-Respondents: Charles E. Sisney and James Dean Van Wyhe, inmates at the South Dakota State Penitentiary and Appellees below; United States of America, Intervenor and Appellee below.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 581 F.3d 639 and reprinted in Petitioner's Appendix ("Pet. App.") at 1a-40a. The opinion of the United States District Court for the District of South Dakota in *Sisney v. Reisch* is reported at 533 F. Supp. 2d 952 and reprinted in Pet. App. 41a-142a. The District Court also issued an opinion in *Van Wyhe v. Reisch*, reported at 536 F. Supp. 2d 1110, that was part of the consolidated appeal considered by the Eighth Circuit. Because its discussion of the issues raised by Sisney's Petition and this Cross-Petition mirrors the opinion in *Sisney v. Reisch*, it was not reprinted in Petitioner's Appendix and is not reprinted here.

## STATEMENT OF JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered on September 10, 2009 (Pet. App. 1a). On December 1, 2009, Justice Alito extended the time to file a petition for writ of certiorari until January 8, 2010. A petition for writ of certiorari was filed by Petitioner Charles Sisney on January 8, 2010, and docketed with responses due by February 10, 2010. Docket No. 09-821. This conditional cross-petition for writ of certiorari is therefore timely filed on or before February 10, 2010, pursuant to Supreme Court Rule 12.5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The constitutionality of an Act of Congress is drawn into question; the United States intervened as a party below after certification pursuant to 28 U.S.C. § 2403(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 1 of the United States Constitution provides: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

Section 3 of the Religious Land Use and Institutionalized Person Act (RLUIPA), 42 U.S.C. § 2000cc-1, provides, in relevant part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance. . . .

## STATEMENT OF THE CASE

Respondents Charles Sisney and James Dean Van Wyhe are prisoners of the state of South Dakota who contend that officials with the South Dakota Department of Corrections ("South Dakota") violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc–5. *Van Wyhe* v. *Reisch*, 581 F.3d 639, 645 (8th Cir. 2009) (Pet. App. 3a). They invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983. The District Court in Sisney's case denied South Dakota's summary judgment motion challenging RLUIPA's constitutionality, and held that it was a valid exercise of Congress' Spending Clause power. *Sisney* v. *Reisch*, 533 F. Supp. 2d 952, 983 (D.S.D. 2008) (Pet. App. 104a). On interlocutory appeal, the Eighth Circuit upheld RLUIPA's constitutionality on the basis that it satisfied the requirements set forth in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), for conditioning a state's receipt of federal funds upon compliance with a federal statutory directive. *Van Wyhe*, 581 F.3d, at 649–52 (Pet. App. 14a-23a). The court reasoned that RLUIPA satisfied the first requirement under *Dole*—that spending be "in pursuit of the general welfare"—because "the concept of welfare . . . is shaped by Congress" and because "Congress has determined that encouraging greater protection of religious worship within prisons promotes the general welfare." *Id.*, at 650 (Pet. App. 16a-17a) (citing *Dole*, 483 U.S., at 208). Having found that RLUIPA also satisfied the remaining requirements under *Dole*, the court upheld it as valid

under the Spending Clause. *Van Wyhe*, 581 F.3d, at 652 (Pet. App. 22a-23a).

The Eighth Circuit then granted summary judgment to the State defendants on Sisney's and Van Whye's claims for monetary damages, holding that the claims were barred by the Eleventh Amendment because RLUIPA did not expressly require States to waive sovereign immunity as a condition for receiving federal funds. Pet. App. 23a-27a, 30a. The case was remanded to the trial court for resolution of the few remaining claims for injunctive relief and retaliation in Sisney's case. Pet. App. 39a-40a. The Eleventh Amendment immunity holding is the subject of Sisney's Petition for Writ of Certiorari, No. 09-821. The remaining injunctive relief claims have since been settled, and the retaliation claims, unrelated to the issues raised by the Petition and this Cross-Petition, have been set for trial. This case is thus ripe for review by this Court.

## REASONS FOR GRANTING THE WRIT

This Court has yet to rule on whether the "institutionalized persons" section of RLUIPA, 42 U.S.C. § 2000cc-1, is a valid exercise of Congress' power under the Spending Clause. The issue was noted but not reached in *Cutter* v. *Wilkinson* because the Court of Appeals in that case had not addressed it. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also id.*, at 727 n.2 (Thomas, J., concurring) (noting that "RLUIPA . . . may well exceed Congress' authority under with the Spending Clause or the Commerce Clause" but that the Court "properly

declines to reach those issues, since they are outside the question presented and were not addressed by the Court of Appeals").

Here, by contrast, the Court of Appeals has explicitly ruled on the issue, and this case is appropriate for review under Supreme Court Rule 10(c): "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." This Court should grant the petition for *certiorari* because the scope of the Spending Clause power—and whether it is subject to any limits whatsoever—bears not only on RLUIPA, but also on the myriad federal regulatory schemes that Congress has enacted pursuant to its purported authority under the Spending Clause.

Furthermore, this Court has not addressed the Spending Clause since its landmark decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), in which this Court reaffirmed the limited scope of Congress' power under the Commerce Clause. In *Lopez*, this Court reasoned that the absence of a meaningful limit would be akin to "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S., at 567. Such an arrangement would violate the principles of enumerated powers and federalism, which are necessary for maintaining a federal government of "few and defined" powers. *Id.*, at 552; *see also id.*, at 567–68 (noting that ruling for the Government "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is

truly national and what is truly local") (internal citations omitted).

This Court likewise recognized in *United States* v. *Morrison*, 529 U.S. 598, 618 (2000), that certain categories of activities do not fall within Congress' Commerce Clause jurisdiction because they have "always been the province of the States." This Court noted that there was "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*; *cf. Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58-73 (1996) (holding that Congress may not use its Article I powers to abrogate state sovereign immunity); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not commandeer state executive officers to enforce federal law); *New York v. United States*, 505 U.S. 144, 187-88 (1992) (overturning a federal provision requiring states to take title to radioactive waste as exceeding Congress' authority and commandeering state legislative processes).

The rationale supporting this Court's recent Commerce Clause jurisprudence applies with equal force to the spending power, which this Court last thoroughly addressed in *South Dakota v. Dole*, 483 U.S. 203 (1987). In that case, this Court recognized a limit on Congress' spending power when it outlined five requirements that Congress must satisfy before conditioning the receipt of federal funds upon a state's compliance with a federal directive. *Id.*, at 207–12. However, some lower courts have read *Dole* as justifying an abdication of the judicial responsibility to enforce the first limit on the

spending power articulated by this Court, that the federal spending be in the "general welfare." *See* Lynn. A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 IND. L.J. 459, 464–68 (2003). The result is that Congress has used its spending power to intrude on state sovereignty by regulating in areas of purely local, rather than national concern. For example, Congress has routinely passed comprehensive regulatory schemes regarding education, *see, e.g. M.A. ex rel. E.S. v. State-Operated School Dist. of the City of Newark*, 344 F.3d 335, 350-51 (3d Cir. 2003) (upholding federal funding of educational services for children with disabilities to states that complied with federal regulatory scheme), in spite of the fact that education has traditionally been the exclusive realm of state authority. *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States").

This case presents this Court with the opportunity to review its Spending Clause jurisprudence in light of its recent acknowledgements of the importance of limiting Congress' parallel powers under the Commerce Clause. This Court's assertion in *Lopez* that the "Constitution mandates . . . withholding from Congress a plenary police power that would authorize enactment of every type of legislation," also necessitates limiting Congress' Spending Clause power in order to protect federalism and to remain faithful to the Constitution. *See* Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196 (2001) (warning that regardless of

how narrowly the court might construe Congress' commerce power, "the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power"); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting) ("[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach"). This Court should grant the petition in order to address this vital issue.

## I. RLUIPA Exceeds Congress' Authority Under The Spending Clause Because It Constitutes Spending That Is Not For The "General Welfare" As Required By The Constitution, As Understood By The Framers, and As Affirmed By Supreme Court Precedent.

The first clause of Article I, Section 8 of the Constitution gives Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...." U.S. Const. art 1, § 8. Congress' authority under this second half of this clause, the "Spending Clause," is plainly limited to two purposes: (1) paying the debts of the United States; and (2) providing for the common defense and general welfare of the United States.

The Eighth Circuit's finding that RLUIPA is a valid exercise of Congress' Spending Clause authority because it is spending for the "general welfare" is inconsistent with the original meaning of this phrase. The Framers of the Constitution used the term "general welfare" to delineate spending that was for national purposes, as opposed to state or regional ones. *See, e.g.*, Alexander Hamilton, Report on Manufactures (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION at 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting that the power is limited to appropriations for "*General* and not *local*" objects). Subsequent presidents also recognized that if this limit on Congress' spending power were removed, it would nullify the quintessential distinction between the federal and state governments and "constitute a sort of partnership between the two . . . equally ruinous to both." James Buchanan, Message to the House of Representatives (Feb. 24, 1859), *reprinted in* 5 A COMPILATION OF THE MESSAGES AND PAPERS AND PAPERS OF THE PRESIDENTS 1789–1897, at 543, 547 (James D. Richardson ed., 1897).

This Court affirmed that "general welfare" is a limit on Congress' spending power in *United States* v. *Butler*, 297 U.S. 1, 67–68 (1936), when it approvingly cited Justice Joseph Story for the proposition that the spending power "extend[s] only to matters of national, as distinguished from local, welfare" and held that Congress may not use its spending power to adopt an Act that "invades the reserved rights of the states." In *Dole*, this Court re-affirmed these limits when it delineated "general welfare" as the first prong of the five-prong

conditional spending test it articulated. 483 U.S., at 206–07. Although the *Dole* Court gave substantial deference to Congress in the determination of "general welfare," 483 U.S., at 207, the opinion deals with the deference generally granted legislative bodies on the question of what promotes the "welfare" of the nation, *see id.*, at 208, without addressing at all the question of whether the program is one of "general" (i.e., national) rather than local scope. Justice O'Connor noted this apparent incongruity between *Butler* and the majority's opinion in *Dole* when she stated:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

*Id.*, at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78).

Congress has exploited this "loophole" in the *Dole* opinion to increase the breadth of its spending power to the detriment of state autonomy. *See* Baker & Berman, *Getting Off the Dole*, at 499–511. The provision of RLUIPA at issue here is merely one manifestation of this larger phenomenon, which merits judicial review. *See Lopez*, 514 U.S., at 577–78 (Kennedy, J., concurring) (recognizing that while preserving federalism is primarily the responsibility of the political branches, "the federal balance is too

essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). Indeed, even when a state has declined federal moneys in order to avoid the conditions on state power, Congress has sought to bypass the sovereign structure of state government and make grants directly to local entities. *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1607(b), 2009 U.S.C.C.A.N. (123 Stat. 303) (allowing state legislatures to accept federal funds over the objection of the state's governor).

### A. "General Welfare" Means National Rather Than Local Welfare.

The Framers of the Constitution understood the phrase "general welfare of the United States" to limit Congress' spending power. *See, generally*, Jeffery T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81 (1999). Madison and Jefferson, for example, understood "general Welfare" as merely granting Congress permission to use federal funds to carry out its other enumerated powers in Article I, Section 8, such as its war powers and commerce power. *See, e.g.*, THE FEDERALIST NO. 41 (James Madison); James Madison, Debate on the Cod Fishery Bill, 3 Annals of Cong., 362, 386–87 (1792); Thomas Jefferson, Opinion on the Constitutionality of the National Bank (1791), *reprinted in* THOMAS JEFFERSON: WRITINGS, at 416, 418 (Merrill D. Peterson, ed., 1984). Madison reasoned that both the

text of the Constitution and the policy behind enumerating Congress' powers supported this interpretation:

> If the terms [general Welfare] be taken in the broad sense they maintain, the particular powers afterwards so carefully and distinctly enumerated would be without any meaning, and must go for nothing. It would be absurd to say, first, that Congress may do what they please, and then that they may do this or that particular thing . . . . In fact, the meaning of the general terms in question must either be sought in the subsequent enumeration which limits and details them, or they convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all.

3 Annals of Cong. at 386–87 (1792). He and Jefferson both understood the danger of interpreting the Spending Clause in a manner that would give Congress unbridled discretion. "Such a view of the Constitution," wrote Madison, "would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them." 30 Annals of Cong. 212 (1817).

Jefferson likewise demonstrated his conviction that "general Welfare" was limited to Congress' enumerated powers when he proposed a constitutional amendment in his 1806 State of the Union Address that would permit surplus federal funds to be used for "public education, roads, rivers, canals, and such other objects of public

improvement." Thomas Jefferson, Sixth Annual Message, *reprinted in* WRITINGS, at 524, 529-530. Jefferson reasoned that Congress could not undertake these public works projects before amending the Constitution "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied." *Id.*, at 530. This episode reveals the degree to which our elected officials recognized constitutional limits on Congress' spending power at the beginning of the nineteenth century, and illustrates the incredible extent to which Congress has ignored those limits since.

Even those who disagreed with Jefferson and Madison's view conceded that the "general Welfare" language itself limited Congress' spending power. Most notably, even Alexander Hamilton, who believed that the Spending Clause broadly conferred on Congress authority that was distinct from the other enumerated powers in Article I, Section 8, acknowledged that "general Welfare" limited Congress so that "the object to which an appropriation of money is to be made be *General* and not *local*." Alexander Hamilton, Report on Manufactures (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, at 446-47. Even the most robust federalist would not have accepted a spending power without limits.

Presidents after Jefferson and Madison continued to view Congress' spending power as limited even while disagreeing about the precise extent of its limits. Monroe agreed with Hamilton's interpretation of the Clause, but nonetheless vetoed as unconstitutional a bill to repair the Cumberland road

because Congress' power to spend was restricted "to purposes of common defence, and of general, not local, national, not State benefit." 39 Annals of Cong. 1849 (1822). Jackson, by contrast, completely rejected Hamilton's position that congressional spending was not limited by the other enumerated powers in Article I, Section 8, describing it as a "dangerous doctrine" when he vetoed as unconstitutional bills appropriating funds for constructing roads and canals, and for improving navigation on the Wabash River. 28 H.R. Journal 27, 29 (1834). He believed that such improvements constituted local improvements rather than improvements for the general welfare. *Id.*, at 32. When vetoing the Wabash River Act, Jackson warned about the dangers of "unconstitutional acts," which "proffer local advantages, and bring in their train the patronage of the Government." *Id.*, at 28. This early warning on the dangers of "earmarks" for purely local projects has proved prescient. Jackson further warned:

> To suppose that, because our Government has been instituted for the benefit of the people, it must therefore have the power to do whatever may seem to conduce to the public good, is an error, into which even honest minds are apt to fall. In yielding themselves to this fallacy, they overlook the great considerations in which the federal constitution was founded. They forget that, in consequence of the conceded diversities in the interest and condition of the different States, it was foreseen, at the period of its adoption, that although a particular measure of the Government might be beneficial and proper in

> one State, it might be the reverse in another—that it was for this reason the States would not consent to make a grant to the Federal Government of the general and usual powers of Government, but of such only as were specifically enumerated.

*Id.*

Presidents Tyler, Polk, Pierce and Buchanan likewise vetoed bills for "internal improvements"—those that uniquely benefited particular states or regions rather than the entire country—as exceeding Congress' power under the Spending Clause. *See, e.g.*, 39 H.R. Journal 1081 (1844); 43 H.R. Journal 82 (1847); 45 S. Journal 361 (1854); 55 H.R. Journal 501 (1859). Polk explained that the Constitution's limitation on congressional spending ensured that local improvements were financed locally, which promoted efficiency and respected federalism:

> [T]he expenditure being in the hands of those who are to pay the money and be immediately benefited, will be more carefully managed and more productive of good than if the funds were drawn from the national treasury and disbursed by the officers of the General Government; that such a system will carry with it no enlargement of federal power and patronage, and leave the States to be the sole judges of their own wants and interests.

43 H.R. Journal 88 (1847). He also warned that if Congress' spending power were not subject to limits, "combinations of individual and local interests will be found strong enough to control legislation, absorb

the revenues of the country, and plunge the government into hopeless indebtedness." *Id.*, at 85.

President Buchanan echoed this concern for preserving the boundary between the national and state governments when he vetoed as unconstitutional an act donating public lands to states for establishing agricultural colleges. James Buchanan, Veto Message to the House of Representatives (Feb. 24, 1859), *reprinted in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 543. He warned that if Congress had this authority, it would:

> break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority. We should then not only "lay and collect taxes, duties, imposts and excises" for Federal purposes, but for every State purpose which Congress might deem expedient or useful. This would be an actual consolidation of the Federal and State Governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the two in the Treasury of the United States, equally ruinous to both.

*Id.*, at 547.

These presidential assertions, and the historical episodes they illuminate, confirm that for the first eighty-five years of our nation's history, the limits on Congress' spending power contained in the Constitution were real and consequential. *See generally*, John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 87

(2001). The exact confines of that limit were debated, but most presidents prior to the Civil War followed Madison's position that Congress could not spend beyond its enumerated powers. Even presidents such as Monroe, who rejected this view, still believed that Congress' spending power was limited by the text of the Clause itself, and that Congress could only spend for purposes that were national, rather than local. 39 Annals of Cong. 1849 (1822).

That "general Welfare" limits Congress' Spending Clause power to national, as opposed to local matters, whether that restriction is confined to the clause itself or to the litany of other enumerated powers, is the only reading of the text that comports with the doctrine of enumerated powers and limited government. Both doctrines were essential in drafting a Constitution that was acceptable to the states, and necessary to ratification. The Framers sought to create a national government with sufficient power to combat the weaknesses of the Articles of Confederation, but lacking the potential to threaten state sovereignty over traditional governmental functions. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison).

Accordingly, Roger Sherman, a delegate to the Constitutional Convention of 1787, proposed that Congress should have power to legislate "in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of the States only, and wherein the general welfare of the United States is not concerned." 2 THE RECORDS OF THE

FEDERAL CONVENTION 21 (Max Farrand, ed., 1911); *see also, id.*, Proposal of Gunning Bedford (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent"). During the Convention, the Committee of Detail considered Sherman's proposal, and others like it, and developed a list of enumerated powers that eventually became Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general Welfare" limitation in the Spending Clause.

As this history illustrates, Congress may only spend money for national, rather than local purposes and it may not interfere with the internal, core governmental functions of the states. One of these core functions is the police power, which has always been considered a fundamental aspect of state sovereignty. *Morrison*, 529 U.S., at 618. The funding of state prisons is inherently local spending because state prisons house those individuals who have committed crimes against the people of the State, as defined by the Legislature of the State—a fact that this Court has previously recognized. *See, e.g., Preiser v. Rodrigeuz*, 411 U.S. 475, 491–92 (1973) ("it is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons").

Because RLUIPA is based on spending that is for a purely local rather than national purpose, and therefore exceeds Congress' power under the Spending Clause as originally understood, this case presents a perfect opportunity for this Court to address whether the limits it has recently reaffirmed with respect to the Commerce Clause apply equally to the Spending Clause.

### B. Existing Precedent of this Court Confirms the General Welfare Limit on Congress' Spending Power.

This Court's two most recent cases construing the Spending Clause, *Butler* and *Dole*, confirm that "general Welfare" remains a limitation on Congress' spending power. In *Butler*, this Court overturned as unconstitutional the Agricultural Adjustment Act of 1933—a national, New Deal program that paid subsidies to farmers who agreed to reduce their crop production—because "The Act invade[d] the reserved rights of the states." 297 U.S., at 68. In its opinion, the Court sketched the outlines of the Spending Clause and discussed the debate between Madison and Hamilton about what should be its proper scope. *Id.*, at 65–67. The Court concluded that Hamilton's view was correct and that: "While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress." *Id.*, at 66.

The Court then discussed the limits on Congress' power, which it deemed were important because, "'The Constitution was, from its very origin, contemplated to be the frame of a national

government, of special and enumerated powers, and not of general and unlimited powers.'" *Id.*, at 66 (quoting Chief Justice Story). Citing Hamilton's assertion that the spending power must be used for "general, and not local" purposes, the Court concluded that Congress' "powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare." *Id.*, at 67. Thus, while *Butler* accepted the broader view of the Spending Clause espoused by Hamilton instead of that held by Madison, it nonetheless recognized a significant limit on the extent of that power, commensurate with the historical understanding of "*general* Welfare" and of the federalism-based purpose for limiting the national spending power.

Fifty years later, in *Dole*, this Court considered a challenge to a federal statute that required states to raise their legal drinking age to twenty-one years, or else forfeit a percentage of federal highway funding. The Court found that Congress may, pursuant to its Spending Clause power, "attach conditions on the receipt of federal funds" provided that it satisfies five requirements. *Dole*, 483 U.S., at 206–212 (the spending scheme must be "in pursuit of the general welfare"; Congress may only condition funds "unambiguously" so that states may freely decide whether to accept them; the condition must be related "to the federal interest in particular national projects or programs"; it may not violate any other constitutional provisions; and it must not rise to the level of coercion).

The opinion specifically affirmed *Butler* for the first of these requirements, namely, that "the exercise of the spending power must be in pursuit of

the general welfare." *Dole*, 483 U.S., at 207. The Court's assertion that courts should defer to Congress' judgment about "whether a particular expenditure is intended to serve general public purposes," does not nullify the requirement that spending must be *general*—that is, for national, rather than local purposes. *Id.* In fact, the *Dole* Court cited *Helvering v. Davis*, 301 U.S. 619, 640 (1937), a case in which this Court recognized that "[t]he line must still be drawn between one welfare and another, between particular and general." The Court largely deferred to Congress to determine whether a program advanced the "welfare" of the nation (i.e., whether the program was "wise"). *Id.*, at 640. However, the Court still reviewed the spending program to ensure that the exercise of power was not arbitrary and that the program at issue was "national" rather than local. *Id.*, at 640-45.

Read together, *Butler* and *Dole* affirm that "*general* welfare" is a limit on Congress' spending power. However, as the opinion below reveals, it is a limit not honored by Congress and not enforced by the lower courts, undoubtedly because the lower courts have misread the deference this Court gave to Congress as applicable not just to the "welfare" determination but to the "general" limitation as well. The Eighth Circuit's conclusory assertion that RLUIPA is a valid exercise of Congress' spending power ignores this critical distinction, for example, even to the point of omitting the "general" limitation in its description of the deference due Congress under the spending power. 581 F.3d, at 650 (Pet. App. 16a-17a) ("As a general matter, 'the concept of

welfare or the opposite is shaped by Congress' in the first instance" (citing *Dole*, 483 U.S. at 208)).

A similar error is made by each of the other circuits that have addressed the issue. See *Madison v. Virginia*, 474 F.3d 118, 125 (4th Cir. 2006) ("'In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress'" (quoting *Dole*, 483 U.S., at 207)); *Cutter v. Wilkinson*, 423 F.3d 579, 585 (6th Cir. 2005) ("Heeding the Supreme Court's instruction to 'defer substantially' to Congress' legislative judgment, we agree with our sister circuits that RLUIPA furthers the general welfare"), *rev'd on other grounds*, 544 U.S. 709 (2005); *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) ("Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority"); *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002) (noting that "federal courts must 'defer substantially' to Congress in determining if a statute advances the general welfare," and further, that "protecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare"), *cert. denied*, 540 U.S. 815 (2003); *cf. Benning v. Georgia*, 391 F.3d 1299, 1305 (11th Cir. 2004) ("Georgia does not dispute that RLUIPA serves the general welfare").

In none of these cases have the courts focused on the distinction between national and local, critical to

this Court's decision in *Butler* and re-affirmed in *Dole*.

Where, as here, the only spending involved is for local prisons, the critical question is whether the federal spending qualifies as "general" rather than merely local welfare. Without complying with that Spending Clause limitation, the conditions Congress seeks to impose via its local spending largess simply cannot be sustained, particularly when they intrude upon core police powers of the states dealing with crime and punishment – quintessential examples of the sovereign police power retained by the states. *See Morrison*, 529 U.S., at 618.

Certiorari is warranted so that this Court can make clear that the lower courts may not simply defer to Congress' assertion that RLUIPA satisfies the general welfare requirement because it seeks to correct a perceived social wrong. Abject deference is unwarranted because Congress has overstepped the line demarcating the national from the local. To allow the lower court holdings to the contrary would, as with the claims of unlimited Commerce Clause authority rejected in *Lopez*, "convert congressional authority . . . to a general police power of the sort retained by the States." 514 U.S., at 567.

## CONCLUSION

RLUIPA is an unconstitutional exercise of Congress' Spending Clause power. The Constitution only allows Congress to spend for the "*general* Welfare," which the framers' understanding, history, and this Court's precedent all reveal to mean

national welfare, as opposed to state or local welfare. The operation of state prisons is an inherently local matter and one that is fundamental to the core functions of state government. Allowing the federal government to regulate state prisons, by means of its spending power, intrudes on state sovereignty and upsets the balance of power between state and local government.

In addition, the lack of a robust, judicially-enforced "general welfare" limitation on the spending power has fuelled the pork-barrel system of legislation that prevails in federal politics. State representatives, eager to ingratiate themselves to their constituents, vie for federal funds to benefit their states, and promises of earmarked funds for particular states are used as bargaining chips to gain majority support for bills. This phenomenon recently made headlines when Senator Ben Nelson of Nebraska cast the deciding vote in favor of health care reform, after the bill's authors exempted Nebraska from having to pay for the proposed expansion of Medicaid. *See,* Monica Davey, *Senator Nelson Defends His Health Care Vote*, New York Times A13 (Dec. 31, 2009). Finally, the absence of a meaningful "general welfare" limit on Congress' Spending power has arguably undermined elected officials' ability to act in furtherance of the actual general welfare. President Polk, writing in 1847, recognized this problem and issued a prophetic warning:

> But a greater practical evil would be found in the art and industry by which appropriations would be sought and obtained. The most artful and industrious [politicians] would be

> the most successful; the true interests of the country would be lost sight of in an annual scramble for the contents of the treasury; and the member of Congress who could procure the largest appropriations to be expended in his district would claim the reward of victory from his enriched constituents. The necessary consequence would be sectional discontents and heart-burnings, increased taxation, and a national debt, never to be extinguished.

43 H.R. Journal 87 (1847). The ramifications of the Spending Clause power clearly extend beyond the provisions of RLUIPA at issue here and go to the heart of Congressional power in our federal system.

For these reasons, the Court should grant the cross-petition for writ of certiorari and use this case as an opportunity to address the scope of Congress' Spending Clause power.

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APR 16 2010

No. 09-953

# In the Supreme Court of the United States

TIM REISCH, ET AL., PETITIONERS

*v*

CHARLES E. SISNEY, ET AL.

*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether Congress acted within its authority under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1, when it enacted the institutionalized persons provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*

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# In the Supreme Court of the United States

No. 09-953

TIM REISCH, ET AL., PETITIONERS

*v.*

CHARLES E. SISNEY, ET AL.

*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1a-40a) is reported at 581 F.3d 639.[1] The opinion of the district court (Pet. App 41a-142a) is reported at 533 F. Supp 2d 952

### JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009. On December 1, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 8, 2010, and the petition was filed on that date. Petitioner Charles Sisney filed a petition for a writ of certiorari in

[1] All references to "Pet App." are to the appendix to the petition for a writ of certiorari in No. 09-821

No. 09-821 on January 8, 2010. The conditional cross-petition for a writ of certiorari was filed on February 9, 2010 The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The underlying facts are fully set forth in the government's response to the petition for a writ of certiorari (09-821 Resp. 1-7) and will only be briefly restated here. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, applies in the institutionalization context and provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering" that interest. 42 U S.C. 2000cc-1(a)(1) and (2).

2. Petitioner in the underlying petition, Charles Sisney, is serving a life sentence in the South Dakota State Penitentiary and filed suit alleging, *inter alia*, that cross-petitioners violated his rights under RLUIPA in various respects. Pet. App 3a, 43a. The district court granted summary judgment to cross-petitioners on petitioner's individual-capacity damages claims under RLUIPA, *id.* at 58a-61a, and held that any recovery on his official-capacity damages claims would be limited to nominal damages, *id.* at 62a-78a. The court also granted summary judgment to cross-petitioners on all but three

of petitioner's official-capacity claims for injunctive relief under RLUIPA. *Id* at 82a-102a, 112a-136a. Finally, the court upheld the constitutionality of RLUIPA, rejecting cross-petitioners' contention that Congress exceeded its authority under the Spending Clause in enacting the statute and that the statute violates the Tenth Amendment of the Constitution and the separation of powers doctrine. *Id* at 102a-112a.

3. Petitioner filed an interlocutory appeal, and the court of appeals upheld the district court's conclusion that Congress validly enacted RLUIPA's institutionalized persons provisions pursuant to its authority under the Spending Clause. Pet. App. 3a, 14a-23a. The court of appeals held, however, that private suits for money damages under RLUIPA are barred by the Eleventh Amendment of the Constitution. *Id* at 23a-30a. The court of appeals further held that the district court erred in refusing to dismiss some, but not all, of petitioner's official-capacity claims for injunctive relief. *Id* at 33a-39a.

## ARGUMENT

Cross-petitioners ask this Court to review the court of appeals' determination that Congress enacted the institutionalized persons provisions of RLUIPA, 42 U.S.C 2000cc *et seq* , pursuant to its authority under the Spending Clause. That determination does not merit further review because it is correct and because it does not conflict with any decision from this Court or from any other court of appeals.[2]

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[2] The petition for a writ of certiorari in *Cardinal* v *Metrish*, No 09-109 (filed July 22, 2009), asks this Court to review the question whether an individual may sue a State or a state official in her official capacity for damages for a violation of RLUIPA At this Court's

1. To date, six courts of appeals, including the court of appeals in this case, have held that Congress validly enacted RLUIPA's institutionalized persons provisions pursuant to its authority under the Spending Clause. See *Madison* v. *Virginia*, 474 F.3d 118, 125 (4th Cir. 2006); *Cutter* v *Wilkinson*, 423 F.3d 579, 584-590 (6th Cir. 2005); *Benning* v *Georgia*, 391 F.3d 1299, 1305-1308 (11th Cir. 2004), *Charles* v. *Verhagen*, 348 F 3d 601, 606-610 (7th Cir. 2003), *Mayweathers* v. *Newland*, 314 F.3d 1062, 1066-1070 (9th Cir. 2002), cert denied, 540 U.S. 815 (2003); Pet. App. 14a-23a. No court of appeals has held otherwise, and cross-petitioners do not assert that the court of appeals' decision conflicts with that of any other circuit court. That alone is a sufficient reason for this Court to deny the cross-petition for a writ of certiorari.

2. Further review of the court of appeals' rejection of cross-petitioners' constitutional challenge to RLUIPA is also not warranted because the court of appeals was correct.

a. The Spending Clause authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Pursuant to that authority, and within specific limits, "Congress may attach conditions on the receipt of federal funds," *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (citing *Fullilove* v. *Klutznick*, 448 U S. 448, 474

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invitation, the United States filed a brief as amicus curiae in *Cardinal* urging that further review be granted on that question Because the same question is presented by the petition for a writ of certiorari filed in this case, the United States filed a brief urging this Court to hold the petition for a writ of certiorari in this case pending the Court's disposition of the petition in *Cardinal*

(1980) (plurality opinion) (Burger, C.J.)), thereby "fix-[ing] the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). This Court has held that the spending power is "not limited by the direct grants of legislative power found in the Constitution," but can be used to achieve broad policy objectives beyond Article I's "enumerated legislative fields." *Dole*, 483 U.S. at 207 (quoting *United States* v. *Butler*, 297 U.S. 1, 65-66 (1936)); see *Printz* v. *United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (contrasting impermissible command and condition on acceptance of federal funds). Thus, it is settled law that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

To be sure, Congress's authority under the Spending Clause is not unlimited. In *Dole*, this Court identified four limitations on Congress's use of that power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207 (quoting U.S. Const. Art. I, § 8, Cl. 1). Second, if Congress places conditions on the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (brackets in original) (quoting *Pennhurst*, 451 U.S. at 17). Third, this Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or pro-

grams.'" *Ibid.* (quoting *Massachusetts* v. *United States*, 435 U.S 444, 461 (1978) (plurality opinion)). And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id* at 208 [3]

b Cross-petitioners do not challenge the validity of RLUIPA under the second, third, or fourth prongs of the *Dole* inquiry. Rather, cross-petitioners argue (Cross-Pet. 8) only that RLUIPA "constitutes spending that is not for the 'general welfare'" (emphasis omitted). Cross-petitioners are incorrect. They argue (Cross-Pet. 18) that "Congress may only spend money for national, rather than local purposes" Of course, RLUIPA is not itself a spending statute; it places conditions on the receipt of all federal funds, but does not appropriate funds for any purpose. Even if cross-petitioners were correct that Congress may exercise its authority under the Spending Clause only for a purpose that is national in scope, the purpose of RLUIPA—to prohibit the use of any federal funds to subsidize discriminatory or unreasonable restrictions on institutionalized persons' religious exercise—is national in scope and benefits the general welfare. Indeed, all the courts of ap-

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[3] The Court in *Dole* also observed that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" 483 U S at 211 (quoting *Steward Mach Co* v *Davis*, 301 U S 548, 590 (1937)) The Court did not, however, suggest that Congress lacks authority to place relevant conditions on the receipt of federal funds whenever the value of the federal offer is too tempting to decline To the contrary, the Court noted that every congressional spending statute "is in some measure a temptation," *id* at 211 (quoting *Steward Mach Co*, 301 U S at 589), and that "to hold that motive or temptation is equivalent to coercion [would be] to plunge the law in endless difficulties" *Ibid.* (quoting *Steward Mach Co*, 301 U S at 589-590) RLUIPA is not unconstitutionally coercive and cross-petitioners do not contend otherwise

peals to have addressed this issue have recognized that RLUIPA's institutionalized persons provisions are an uncontroversial invocation of Congress's spending power to "protect[] religious worship in institutions from substantial and illegitimate burdens." *Mayweathers*, 314 F.3d at 1066; see *Madison*, 474 F.3d at 125 ("[W]e have no trouble concluding that RLUIPA's 'attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare.'") (quoting *Charles*, 348 F.3d at 607); see also *Cutter*, 423 F.3d at 585.

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court recognized that Congress validly exercised its authority under the Spending Clause when it enacted Title VI of the Civil Rights Act of 1964, 42 U.S.C 2000d *et seq.*, which prohibits discrimination on the basis of race by recipients of federal funds. The Court explained that Congress may use its authority under the Spending Clause to ensure that federal funds do not flow to governmental entities that engage in discrimination because such funding would tend to "encourage[], entrench[], subsidize[], or result[] in racial discrimination." *Lau*, 414 U.S. at 569 (citation omitted). Like the spending conditions at issue in *Lau*, RLUIPA's institutionalized persons provisions ensure that federal funds will not be used to subsidize state operations involving conduct that Congress has no wish to support, including discrimination against religion and the unjustified imposition of substantial burdens on an inmates' religious exercise. RLUIPA is one of many statutes enacted pursuant to the Spending Clause that is designed to ensure that recipients of federal funds do not engage in discriminatory behavior. See, *e g* , 20 U.S.C 1681 *et seq* (Title IX of

Education Amendments of 1972 prohibits discrimination on the basis of sex in all education programs receiving federal funds), 29 U.S.C 794 (Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by all recipients of federal funds); 42 U.S.C. 6101 *et seq.* (Age Discrimination Act of 1975 prohibits discrimination on the basis of age by recipients of federal funds).

Cross-petitioners argue (Cross-Pet. 19) that the conditions RLUIPA places on the receipt of federal funds cannot bind the State of South Dakota in this case because "RLUIPA is based on spending that is for a purely local rather than national purpose, and therefore exceeds Congress' power under the Spending Clause as originally understood." *Ibid.* Cross-petitioners make no attempt to identify the federal funds that South Dakota applied for and received, nor do cross-petitioners suggest that the receipt of such funds was in any way involuntary. Nevertheless, cross-petitioners assert (*id.* at 18) that any federal financial assistance that would be implicated in this case cannot have been spent for the general welfare because it was ultimately received by the State's correctional system and "[t]he funding of state prisons is inherently local spending because state prisons house those individuals who have committed crimes against the people of the State, as defined by the Legislature of the State."

By cross-petitioners' logic, virtually no Spending Clause legislation would be constitutional because such legislation almost always provides for funding at a local level, with conditions that ensure that federal money does not subsidize activity Congress considers detrimental to the general welfare. For example, the application of Title VI that this Court upheld in *Lau* involved fed-

eral spending that was received by public schools. 414 U.S. at 568. Although cross-petitioner contends (Cross-Pet. 7) that Congress may not use its spending power to pursue objectives related to education, this Court had no difficulty holding in *Lau* that Title VI is within Congress's spending clause power, noting that "[w]hatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citation omitted). Cross-petitioners have not offered any reason why a State's voluntary acceptance of federal funding for its prison system should be subject to a different rule. The fact that discriminatory conduct is effected through local entities does not diminish either its harm to the general welfare or Congress's legitimate interest in ensuring that federal funds do not subsidize such behavior [4] Indeed, "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion," and "[t]he federal government also has a strong interest in monitoring the treatment of federal inmates housed in state prisons and in contributing to their rehabilitation." *Mayweathers*, 314 F.3d at 1067; see *Benning*, 391 F.3d at 1307, *Charles*, 348 F.3d at 608 RLUIPA's institutionalized persons provisions thus "follow[] in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and in-

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[4] Because money is fungible, that distinct federal interest exists regardless of whether the funds directly finance the proscribed operations, or whether they make it possible by freeing up funds from other operations *Sabri* v *United States*, 541 U S 600, 605-606 (2004)

fringement on fundamental freedoms.'" *Charles*, 348 F.3d at 607 (quoting *Mayweathers*, 314 F.3d at 1067).[5]

## CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] In addition, as the courts of appeals that have considered the question have unanimously held, RLUIPA satisfies the other elements of the *Dole* inquiry—and cross-petitioners do not argue otherwise. RLUIPA's institutionalized persons provisions unambiguously put recipients of federal grants on notice that those provisions apply to any "program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). RLUIPA's conditions on the receipt of federal funds are directly related to the statute's purpose of preventing religious discrimination in institutions that accept those funds. And RLUIPA's institutionalized persons provisions do not "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210.

Supreme Court, U.S.
FILED
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No. 09-953

# In The Supreme Court of the United States

TIM REISCH, ET AL.,

*Cross-Petitioners,*

v.

CHARLES E. SISNEY, JAMES DEAN VAN WYHE, AND UNITED STATES OF AMERICA,

*Cross-Respondents,*

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF CHARLES E. SISNEY IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1, is a constitutional exercise of Congress' legislative authority under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1. Specifically, whether Congress has the authority to determine that RLUIPA was enacted in pursuit of the general welfare to protect fundamental religious liberty and promote prisoner rehabilitation, or, instead, whether federal spending for state prisons violates the Spending Clause by intruding upon the states' police power.

## LIST OF PARTIES

Cross-Respondents are Charles E. Sisney, an inmate at the South Dakota State Penitentiary, and the United States of America, Intervenor below.

Cross-Petitioners, in their individual and official capacities, are Tim Reisch, Secretary of Corrections for South Dakota; Douglas L. Weber, Chief Warden for the Department of Corrections of South Dakota; Dennis Block, Associate Warden for the South Dakota State Penitentiary; Jennifer Wagner a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; and Daryl Slykhuis, Interim Warden for the South Dakota State Penitentiary.

James Dean Van Wyhe, an appellee in the circuit court proceedings, is named as a conditional Cross-Respondent, but is not a petitioner in this Court.

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## OPINIONS BELOW

The court of appeals' opinion is reported at 581 F.3d 639. Pet. App. 1a.[1] The district court's opinion is reported at 533 F. Supp. 2d 952. Pet. App. 41a.

## JURISDICTION

The court of appeals' judgment was entered on September 10, 2009. On January 8, 2010, pursuant to a 30-day extension of time, Petitioner Charles E. Sisney filed a petition for a writ of certiorari. On February 9, 2010, Respondents Tim Reisch *et al.* filed a conditional cross-petition for a writ of certiorari. On March 3, 2010, Justice Samuel Alito extended the time for Cross-Respondents, including the United States, to file a response to the cross-petition until April 19, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### I. Constitutional Provisions

The Spending Clause in Article I of the United States Constitution provides, in part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

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[1] References to Petitioner's Appendix are to the appendix filed in support of the petition for a writ of certiorari pending in *Sisney v. Reisch*, No. 09-821, filed Jan. 8, 2010.

II. Statutory Provisions

Section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, provides, in pertinent part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several States. . . .

## COUNTER-STATEMENT OF THE CASE

### I. Statutory Background

Enacted on September 22, 2000, in response to this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, represents "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Less sweeping in scope than its predecessor, the Religious Freedom Restoration Act, and invoking authority under the Spending and Commerce Clauses, Congress enacted RLUIPA to protect religious liberty against government-imposed burdens in two distinct contexts—discretionary applications of state and local land use regulations and the religious exercise of persons institutionalized in prisons, mental hospitals and similar state institutions.

Section 3 of RLUIPA, at issue here, applies to institutionalized persons and provides that no state or local government "shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc-1(a). Congress did not invoke its

Fourteenth Amendment enforcement powers in enacting Section 3. Instead, in keeping with a long tradition of federal anti-discrimination legislation, Congress established compliance with Section 3 as a condition on the receipt of federal funds. Under Section 3(b), RLUIPA applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance,"[2] or "the substantial burden affects, or the removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(1)-(2). Of relevance here, the term "program or activity" is defined to include "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. § 2000d-4a(1)(A); *see* 42 U.S.C. § 2000cc-5(6).

Before enacting Section 3, and seeking to establish an evidentiary record sufficient to withstand this Court's scrutiny, Congress documented in hearings spanning three years that "'frivolous and arbitrary'" barriers impeded institutionalized persons' free religious exercise. *Cutter*, 544 U.S. at 716 (quoting 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways")). Evidence before Congress demonstrated that in the

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[2] Every state, including South Dakota, *see* Pet. App. 21a-22a, accepts federal funding for its prisons. *Cutter*, 544 U.S. at 716 n.4.

absence of federal legislation, prisoners, civil detainees and individuals institutionalized in mental hospitals continued to endure substantial burdens in practicing their religious faiths. *See, e.g.*, 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000); 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000); H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10 (summarizing testimony). Congress heard testimony from witnesses who recounted cases in which prison officials, arbitrarily and without justification, denied prisoners access to food, clothing or religious articles that were required by the prisoners' faiths. H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10. For example, congressional testimony demonstrated that prison officials disallowed the lighting of Chanukah candles but allowed votive candles, refused to purchase or allow prisoners to receive matzo, which Jews are required to eat on Passover, and refused to let Jewish prisoners fast when their religion so required or take a sack lunch to break their fast at nightfall. *See* Protecting Religious Liberty After *Boerne v. Flores* (Pt. III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 1st Sess. 41, 43 (1998) (statement of Isaac Jaroslawicz, Director of Legal Affairs, Aleph Institute); *see also Cutter*, 544 U.S. at 716 n.5 (citing examples).

Congress heard testimony concerning a case in which officials allowed a prisoner to attend Episcopal services but forbade him from taking communion, (*see* 146 Cong. Rec. S7774, S7775), and a case in which prison rules "without a ghost of a reason," prevented

Protestant prisoners from wearing crosses, as in *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999).

Based on this testimony, Congress concluded that "[i]nstitutional residents' right to practice their faith is at the mercy of those running the institution." 146 Cong. Rec. S7774, S7775.

In light of these findings, and in order "[t]o secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard." *Cutter*, 544 U.S. at 716-17. As this Court recognized, Section 3 governs institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter*, 544 U.S. at 720-21. RLUIPA thus "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion." *Id.*

While RLUIPA's protection is broad, it is not unlimited, and it accords due deference to prison administrators. Even where a plaintiff establishes a substantial burden on religious exercise, prison officials can defeat her claim by establishing that the burden is justified by a compelling governmental interest furthered by the least restrictive means. Indeed, as the *Cutter* Court recognized, Congress, in enacting RLUIPA, expressly anticipated that "courts will

continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 146 Cong. Rec. at S7775; *see Cutter*, 544 U.S. at 722-23 (noting that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety and security in penal institutions" and stating that "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."); *see id.* at 725 (noting that the "'federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners,'" and that "[t]he Congress that enacted RLUIPA was aware of the Bureau's experience") (citation omitted).

Unlike remedial legislation enacted pursuant to the Fourteenth Amendment, and because compliance with the substantive provisions of Section 3 is conditioned on the receipt of federal financial assistance pursuant to the Spending Clause, the states retain the power and the freedom to refuse federal funds and avoid the requirements of Section 3.[3]

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[3] Where plaintiff relies on Section 3(b)(2) and demonstrates an effect on commerce, defendant may defeat the jurisdictional basis by establishing that the burdens at issue, in the aggregate, do not have a substantial effect on commerce. 42 U.S.C. § 2000cc-2(g).

II. District Court's Opinion

Petitioner Charles Sisney, an inmate at the South Dakota State Penitentiary, brought an action against South Dakota prison officials asserting interference with his rights of free religious exercise in violation of RLUIPA. Pet. App. 43a-46a. The prison officials sought summary judgment asserting qualified immunity and Eleventh Amendment immunity, and challenging the constitutionality of RLUIPA on various grounds. Pet. App. 42a-43a. The United States intervened to defend RLUIPA's constitutionality. The district court upheld RLUIPA as a valid exercise of Congress' Spending Clause power, and rejected the balance of the constitutional claims. Pet. App. 102a-112a. The court granted summary judgment on the individual capacity claims, finding that because RLUIPA was enacted under the Spending Clause, Congress could not subject non-recipients of federal funds to private liability. Pet. App. 58a-61a.

In upholding RLUIPA as a constitutional exercise of Spending Clause power, the district court applied the four-factor test set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987), for determining the validity of conditions Congress may impose to persuade funding recipients to conform to its policy choices. Pet. App. 104a-112a. The district court invoked *Cutter's* recognition of the congressional hearings documenting the frivolous or arbitrary barriers to institutionalized persons' religious exercise, and agreed with the Fourth, Seventh and Ninth Circuits that RLUIPA promotes the general welfare by protecting

fundamental religious rights against unjustified and substantial burdens, and promoting prisoner rehabilitation. Pet. App. 105a-107a (stating "the First Amendment's protection of the free exercise of religion 'demonstrates the great value placed on protecting religious worship from impermissible government intrusion'" and "'RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms'") (quoting *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002)).

The district court found that RLUIPA unambiguously sets forth the conditions on which state governments accept federal prison funds, and thus RLUIPA satisfied the second *Dole* factor. The third factor was "easily satisfied" because "'[b]oth the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, and those goals are related to the use of federal funds for state prisons.'" Pet. App. 108a (quoting *Benning v. Georgia*, 391 F.3d 1299, 1308 (11th Cir. 2004)). Concerning the fourth *Dole* factor, the court rejected the contention that RLUIPA is coercive or that it induces South Dakota to violate the Constitution, particularly the Tenth Amendment, under which power is not reserved to the states when Congress acts pursuant to Article I. Pet. App. 109a (quoting *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003)). The district court noted that this Court has established a constitutional floor, not a ceiling, for the protection of religious liberty, and has explicitly invited the political branches to provide heightened legislative protection

for religious worship. Pet. App. 109a-110a (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)).

On the Eleventh Amendment, the district court denied summary judgment, noting that "'RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination,'" Pet. App. 71a (citation omitted), and concluding that RLUIPA's remedial provision for "appropriate relief" expressly permits recovery of monetary damages; thus, by voluntarily accepting federal correctional funds, South Dakota waived its immunity from suits for monetary damages under the Civil Rights Remedies and Equalization Act of 1986 (CRREA), 42 U.S.C. § 2000d-7. Pet. App. 57a-58a.

III. Eighth Circuit's Opinion

The Eighth Circuit Court of Appeals affirmed that RLUIPA is a constitutional exercise of Congress' Spending Clause power, but reversed on Eleventh Amendment grounds. The United States intervened to defend the constitutionality of RLUIPA.

In affirming the district court, the Eighth Circuit joined every other circuit court of appeals that has addressed the question to conclude that Section 3 is a constitutional exercise of legislative power under the Spending Clause. Pet. App. 14a-22a. The Eighth Circuit expressly adopted the reasoning set forth by the decisions of the Fourth, Sixth, Seventh, Ninth and Eleventh Circuits upholding RLUIPA against a Spending Clause challenge. The Eighth Circuit engaged in a straightforward application of the *Dole* factors,

noting as this Court has that the Spending Clause provides Congress with incidental authority to "'attach conditions on the receipt of federal funds, and [Congress] has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal money[] upon compliance by the recipient with federal statutory and administrative directives.'" Pet. App. 15a (quoting *Dole*, 483 U.S. at 206 (internal marks omitted)). Following *Dole*, the court of appeals stated that under the Spending Clause, "Congress may use conditional grants of federal funds to achieve objectives that are not within the scope of Article I, *id.*, such as requiring a state to waive its 'sovereign immunity as a condition of receiving federal funds, even though Congress could not order the waiver directly.'" Pet. App. 15a (citing *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001)).

The court of appeals determined that a state prison receiving funds under RLUIPA does so on two conditions: (1) that prison officials not impose a substantial burden on an inmate's free religious exercise unless the burden is justified by a compelling state interest achieved through the least restrictive means, and (2) that the state must submit to judicial proceedings for "appropriate relief" to enforce RLUIPA. Pet. App. 16a.

The court of appeals found the first *Dole* factor, requiring legislation to be in pursuit of the general welfare, was satisfied because RLUIPA protects inmates' religious exercise. The court of appeals rejected the contention that RLUIPA interferes with

prison administration and improperly encroaches on a purely local concern—the operation of state correctional facilities. Following *Dole*, the court stated that "[a]s a general matter, 'the concept of welfare or the opposite is shaped by Congress' in the first instance." Pet. App. 16-17a (quoting *Dole*, 483 U.S. at 208 (internal marks omitted)). The court of appeals held:

> Congress has determined that encouraging greater protection of religious worship within prisons promotes the general welfare, and we find it to be beyond serious dispute that this protection furthers society's larger goal of rehabilitating inmates as well as simply respecting individual religious worship. Purely local matters of prison administration are not jeopardized because RLUIPA permits even substantial burdens on religious exercise to be imposed when the state uses the least restrictive means of pursuing its compelling governmental interests.

Pet. App. 17a.

Echoing *Cutter*, the court of appeals further held:

> RLUIPA allows courts to give 'due deference' to the expertise of prison officials in achieving the compelling government interests involved in prison operations, and 'Congress did not intend to overly burden prison operations' but to

> provide heightened religious protection 'without undermining the security, discipline, and order of those institutions.' *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 987-88 (8th Cir. 2004), *cert. denied*, 543 U.S. 991 (2004)).

Pet. App. 17a.

Following five other circuits, the Eighth Circuit found the second and third *Dole* factors were satisfied, concluding that "RLUIPA sets forth the general right to heightened protection of religious exercise with sufficient clarity, and unambiguously conditions the states' acceptance of federal funding on its agreement to enforce that protection," Pet. App. 19a, and that "'[b]oth the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, and those goals are related to the use of federal funds for state prisons.'" *Id.* (quoting *Benning*, 391 F.3d at 1308).

Regarding the fourth *Dole* factor, the court of appeals rejected the contention that RLUIPA contravenes the doctrine of separation of powers by creating a higher standard of review than that which applies to constitutional claims. As *Cutter* previously noted, the court of appeals expressly held that:

> RLUIPA appropriately views the constitutional standard as a floor, not a ceiling, and provides additional statutory protection for religious worship in a particular context. *See Mayweathers*, 314 F.3d at 1070 (stating the Court in

> *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990), 'explicitly left [the question of whether to provide] heightened legislative protection for religious worship to the political branches').

Pet. App. 20a-21a.

Thus, "Congress's policy decision to provide this heightened protection is well within Congress's appropriate legislative role. 'Nothing in the Spending Clause . . . forecloses Congress from placing conditions on federal funds that reach beyond what the Constitution requires.'" Pet. App. 21a (citation omitted).

Finally, finding that RLUIPA's conditions are not unconstitutionally coercive, the court of appeals rejected the idea that the states are forced to comply with RLUIPA. "While a potential loss of 100% of the federal funding for state prisons would indeed be painful, the statute is intended as an inducement, and the final choice is left to each state." Pet. App. 22a. "'[H]ard choices do not alone amount to coercion.'" *Id.* (quoting *Madison v. Virginia*, 474 F.3d at 118, 128 (4th Cir. 2006)). "'"If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."'" *Id.* (quoting *Jim C.*, 235 F.3d at 1082 (quoting *New York v. United States*, 505 U.S. 144, 168 (1992)). Thus, "[w]e conclude that 'the Spending Clause allows Congress to present States with this sort of choice,' *id.*, and that RLUIPA is not unduly coercive." *Id.*

On the merits of the RLUIPA claims, the court of appeals affirmed the denial of summary judgment, finding that the prison's refusal to allow Petitioner to celebrate the festival of Sukkot in a succah, as the Jewish faith requires, imposed a substantial burden under RLUIPA, and reversed summary judgment on the remaining injunctive relief claims. Pet. App. 33a-37a.

IV. Proceedings in This Court

On January 8, 2010, a petition for a writ of certiorari in *Sisney v. Reisch*, No. 09-821, was filed, raising the question whether the Eleventh Amendment bars private suits for money damages by prisoners against state officials for violations of Section 3 of RLUIPA, and whether the express prohibition against discrimination by federal funding recipients set forth in CRREA effectuates a waiver of Eleventh Amendment immunity, either alone or in combination with RLUIPA. Pet. at i-ii, 32-39; Pet. App. 23a-30a, 70a-76a.

On February 9, 2010, Respondent South Dakota filed a conditional cross-petition for a writ of certiorari to consider the constitutionality of RLUIPA under the Spending Clause. *Reisch v. Sisney*, No. 09-953.

On March 18, 2010, pursuant to this Court's November 2, 2009, invitation, the Solicitor General filed *amicus curiae* briefs expressing the views of the United States in *Sossamon v. Texas*, No. 08-1438, and *Cardinal v. Metrish*, No. 09-109, on the question whether RLUIPA effectuates a waiver of Eleventh Amendment immunity. The Solicitor General recommended that certiorari is warranted to resolve

the split among the circuits on whether RLUIPA contemplates private suits for money damages and, if so, whether such suits are barred by the Eleventh Amendment, *see* Brief for the United States in *Cardinal v. Metrish* at 6, 14-21, and further that CRREA effectuates a waiver of Eleventh Amendment immunity by federal funding recipients. *Id.* at 8-13. The Solicitor General recommended that certiorari should be granted in *Cardinal* and that *Sossamon* should be held pending disposition of *Cardinal.*

On April 12, 2010, the Solicitor General filed her response recommending that *Sisney* be held pending *Cardinal.* South Dakota filed a brief in opposition.

## REASONS FOR DENYING THE WRIT

### I. THE QUESTION PRESENTED FAILS TO IMPLICATE A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS AND DOES NOT WARRANT REVIEW, AS ALL SIX CIRCUITS THAT HAVE CONSIDERED THE QUESTION HAVE UPHELD RLUIPA AS VALID SPENDING CLAUSE LEGISLATION

Cross-Petitioners have failed to demonstrate that review of the Eighth Circuit's decision is warranted by this Court. Six circuit courts of appeals, including the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, have concluded that RLUIPA constitutes a valid exercise of Congress' legislative power under the Spending Clause. Every circuit that has considered the question has determined that

RLUIPA constitutes valid Spending Clause legislation, and every circuit that has considered the question has determined that RLUIPA was enacted in pursuit of the general welfare. There is no split among the circuits on this question, not even a dissenting opinion.

In expressly adopting the reasoning set forth by its sister circuits, the Eighth Circuit joined every other circuit that has rejected a Spending Clause challenge, "with little to add." Pet. App. 14a. *See Madison v. Virginia*, 474 F.3d 118, 123-29 (4th Cir. 2006); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1305-09 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606-11 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003); *see also Sossamon v. Texas*, 560 F.3d 316, 328-29 (5th Cir. 2009), *petition for cert. pending*, No. 08-1438 (filed May 18, 2009) (concluding that RLUIPA "was passed pursuant to the Spending Clause"); *Smith v. Allen*, 502 F.3d 1255, 1270, 1274 n.9 (11th Cir. 2007) (agreeing that RLUIPA "hinges on Congress' Spending Power").

Every one of those circuits easily found that RLUIPA satisfies the first *Dole* restriction. *See Madison*, 474 F.3d at 125 (noting that *Dole* requires substantial deference to Congress' legislative judgment, citing *Cutter* for its finding that "Congress sought to protect prisoners' religious liberty from unjustified and substantial burdens," and concluding that "RLUIPA's 'attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the

general welfare.'") (quoting *Charles*, 348 F.3d at 607); *Cutter*, 423 F.3d at 585 ("Heeding the Supreme Court's instruction to 'defer substantially' to Congress' legislative judgment, we agree with our sister circuits that RLUIPA furthers the general welfare."); *Charles*, 348 F.3d at 607 ("RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.' . . . Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority.") (citation omitted); *compare Benning*, 391 F.3d at 1305 (finding RLUIPA valid under the Spending Clause but declining to address first *Dole* restriction where state did not dispute that RLUIPA serves the general welfare).

The circuit courts have been in complete accord since 2002, when the Ninth Circuit recognized that "Congress possesses great leeway to determine which statutory aims advance the general welfare" and held:

> [P]rotecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting

> religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms. *See, e.g.*, Title VI, 42 U.S.C. § 2000d *et seq.* (2002); Title VII, 42 U.S.C. § 2000e *et seq.* (2002); Title IX, 20 U.S.C. § 1681 (2002). No sound reason exists to disturb Congress's finding that RLUIPA promotes the general welfare.

*Mayweathers*, 314 F.3d at 1066-67 (emphasis in original); *see also Madison*, 474 F.3d at 128 (stating that "Congress has a legitimate interest in seeing how federal funds are spent. Congress also has a legitimate interest in protecting the religious freedoms of inmates and in not funding systems that violate them").

In sum, there is simply no serious dispute among the circuit courts that Section 3 of RLUIPA promotes the general welfare, the purpose of which was documented in evidentiary hearings before Congress and recognized by this Court in *Cutter*.

So, too, the circuit courts of appeals have uniformly rejected the contention that RLUIPA

usurps the regulation of a core state function in violation of the Tenth Amendment or state sovereignty. While punishment remains a basic police power, the Sixth, Seventh, Ninth, and Eleventh Circuits, those courts which have addressed the question, have concluded that RLUIPA does not regulate the operation of state prisons or commandeer compliance; rather, prison officials remain free to run prisons as they see fit so long as they avoid substantially burdening prison inmates' free exercise of religion. *See Cutter*, 423 F.3d at 589-90 ("RLUIPA does not regulate a state's operation of its prison system and . . . the Tenth Amendment does not limit Congress's power to place conditions on federal funding;" rather, "Congress prohibited the operators of prisons and other institutions that receive federal funding from engaging in certain conduct."); *Benning*, 391 F.3d at 1308-09 ("'RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of [the power of Congress], which does not run afoul of the Tenth Amendment's protection of the principles of federalism.'") (citation omitted); *Charles*, 348 F.3d at 609 ("[T]he Tenth Amendment does not restrict the range of conditions Congress can impose on the receipt of federal funds, even if Congress could not achieve the goal(s) of those conditions directly."); *Mayweathers*, 314 F.3d at 1069 (RLUIPA "does not regulate the operation of prisons").

Even then, substantially burdensome prison regulations can be justified by compelling

governmental interests, or states can simply decline federal funds and voluntarily opt out. *See Cutter*, 423 F.3d at 589 ("RLUIPA does not require the states to enact or administer a federal program. The Act does not demand that states take any affirmative action at all. To the contrary, RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion, unless the states' actions are the least restrictive means of furthering a compelling governmental interest."); *Madison*, 474 F.3d at 128 (rejecting claim that RLUIPA intrudes on state sovereignty where "one attribute of State sovereignty is the ability to waive it in pursuit of other objectives, in this case pursuit of federal funding"); *Benning*, 391 F.3d at 1308-09 ("RLUIPA does not compel the states to regulate in a specific manner" because "RLUIPA . . . 'leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is eliminated.'") (citation omitted); *Mayweathers*, 314 F.3d at 1069 ("If states disagree with the requirements of RLUIPA they remain free to forgo federal funding and opt out of its mandates.").

Here, too, on the question of whether RLUIPA interferes with local concerns the circuit courts of appeals are in complete accord, and not one has endorsed Cross-Petitioners' position. Given the substantial deference courts are instructed by *Dole* to accord Congress, the explicit invitation extended to the political branches in *Smith*, the extensive evidentiary record Congress amassed as recognized in *Cutter*, and the sovereign authority retained by the states to implement or opt out of RLUIPA as they see fit, "[t]o

strike RLUIPA down on Spending Clause grounds would be an extraordinary assertion of judicial authority." *Madison*, 474 F.3d at 129.

Absent a split among the circuits, or any decision supporting Cross-Petitioners' construction, review by this Court is not warranted.

## II. THE QUESTION PRESENTED FAILS TO IMPLICATE A CONFLICT WITH ANY OF THIS COURT'S PRECEDENTS, AS THE EIGHTH CIRCUIT'S DECISION REPRESENTS A STRAIGHTFORWARD APPLICATION OF *BUTLER* AND *DOLE*

Cross-Petitioners contend that review is warranted because the Eighth Circuit deviated from *Dole* by deferring to Congress' legislative policy determination that RLUIPA promotes the general welfare, and to the extent the courts of appeals have declined to apply *Dole* in a manner that restricts the scope of Congress' legislative power under the Spending Clause to its enumerated Article I fields. Despite Cross-Petitioners' characterization, the Eighth Circuit, and the five circuit courts it followed, engaged in a straightforward application of *Dole* and did not remotely deviate from this Court's precedents. Indeed, *Dole* expressly forecloses Cross-Petitioners' argument.

In *Dole*, this Court made clear both that courts should substantially defer to Congress' policy judgments regarding the general welfare, and that Congress' power to legislate under the Spending Clause is not limited to Article I's enumerated fields.

The Spending Clause gives Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Congress' power under the Spending Clause includes the power to require states to comply with federal directives as a condition of receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may require states to raise the minimum drinking age to 21 as a condition of receiving federal highway funds). While Congress cannot force the states to enact or administer a federal regulatory scheme, the Spending Clause is a "permissible method of encouraging a State to conform to federal policy choices," because "the ultimate decision" of whether to conform is retained by the states - who can always decline the federal grant. *New York v. United States*, 505 U.S. 144, 168 (1992). In the Spending Clause context, Congress has "broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also Dole*, 483 U.S. at 206 (Congress "has repeatedly employed the [Spending Clause] power to further broad policy objectives by conditioning receipt of federal money[] upon compliance by the recipient with federal statutory and administrative directives").

Congress' power is not unlimited. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 & n.13 (1981); thus, this Court in *Dole* placed several restrictions upon Congress' authority to persuade: (1) the legislation must be in pursuit of the

general welfare, (2) conditions on the state's receipt of federal funds must be set out unambiguously so that participation is the result of a knowing and informed choice, (3) conditions on federal funds must be related to the federal interest in particular national projects or programs, (4) conditions must not be prohibited by other constitutional provisions, and (5) the circumstances must not be so coercive that "pressure turns into compulsion." *Dole*, 483 U.S. at 207-11.

Even so, this Court has expressly recognized that Congress' power to legislate pursuant to the Spending Clause is not limited to the scope of its enumerated powers; rather, Congress may use its spending power to pursue policy objectives outside the scope of Article I's "enumerated legislative fields." *Dole*, 483 U.S. at 207 (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)). Indeed, this Court long ago considered the historical commentaries of Hamilton and Madison and expressly rejected Cross-Petitioners' narrow construction of the Spending Clause:

> Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. . . . Mr. Justice Story, in his Commentaries, espouses the

> Hamiltonian position. . . . Study of all these [writings] leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that *the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.*

*Butler*, 297 U.S. at 65-66 (emphasis added); *see also Dole*, 483 U.S. at 207 ("[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") (internal citation and quotation omitted).

This Court has not retreated from *Butler*, or from *Dole*, since. *See, e.g.*, *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 58-59 (2006) (rejecting Spending Clause challenge and noting that where Congress was free to regulate directly pursuant to its Article I powers, it could necessarily impose conditions pursuant to its spending power, which is "arguably greater" than Congress' power to regulate directly because funding recipients are "free to decline the federal funds"); *New York*, 505 U.S. at 167 (stating that where Congress may lack the power to regulate directly, "[t]his is not to

say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the states as a method of influencing a State's policy choices," and citing *Dole* as one of many examples of validly exercised Spending Clause power by which "Congress may urge a State to adopt a legislative program consistent with federal interests").[4] No circuit court has suggested otherwise. *Compare Madison*, 474 F.3d at 126-27 (rejecting contention that this Court adopted the Madisonian, rather than the Hamiltonian, view of the Spending Clause, and refusing to overrule "decades of clear directives" concerning the scope of Spending Clause power.)

Just as fundamentally, and despite Cross-Petitioners' suggestion to the contrary, this Court has directed, clearly and expressly, that: "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress . . . ." *Helvering v. Davis*, 301 U.S. 619, 645 (1937). As Justice Cardozo observed: "The discretion, however, *is not confided to the courts.* The discretion belongs to Congress, unless the choice is

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[4] Specifically, according to this Court, "[s]imilar examples abound." *Id.* at 167 (collecting cases); *see also* Erwin Chemerinsky, "*Protecting the Spending Power*," 4 CHAP. L. REV. 89, 89-97 (2001) (discussing Hamilton's view and pre- and post-*Dole* authority for a broad construction of the Spending Clause).

clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* at 640 (emphasis added). This Court has left to the political branches the determination of what promotes the general welfare absent "a showing that by *no reasonable possibility* can the challenged legislation fall within the wide range of discretion permitted to the Congress." *Id.* at 641 (quoting *Butler*, 297 U.S. at 67) (emphasis added).

Indeed, the deference due Congress' policy judgments is such that this Court has indicated doubt whether a failure to advance the general welfare could ever be adequate grounds for invalidating an otherwise valid federal statute. *See Dole*, 483 U.S. at 207 n.2; *see also Mayweathers*, 314 F.3d at 1066.

Such deference to Congress' legislative determinations and policy choices is particularly apt in this case, in light of RLUIPA's long history and this Court's express invitation for the political branches to provide heightened legislative protection for religious liberty beyond what the Constitution requires. *See Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

Here, as this Court in *Cutter* expressly recognized, Congress, in enacting RLUIPA, sought to protect religious liberty from unjustified and substantial burdens. Congress certainly has a legitimate interest in ensuring that its funds do not subsidize discriminatory behavior or conduct that infringes upon individual liberties, such as the free exercise of religion. *See Benning*, 391 F.3d at 1303; *Charles*, 348 F.3d at 608-09; *Mayweathers*, 314 F.3d at

1067; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652-54 (1999) (upholding anti-discrimination prohibition of sexual harassment in schools and corresponding private right of action as a condition on receipt of federal funds under Title IX). RLUIPA's aim to protect institutionalized persons' free religious exercise and promote rehabilitation falls squarely within the scope of the general welfare.

Under *Dole*, that policy choice deserves substantial deference. Cross-Petitioners cite no contrary precedent from this Court.

Cross-Petitioners furthermore dedicate several pages to historical references offered in support of a narrow Madisonian construction of the Spending Clause. Cross-Pet. at 11-18, 20. However, as discussed, this Court has expressly rejected the Madisonian view, and has not indicated a willingness to overrule *Butler* or *Dole*. Moreover, in each of the examples Cross-Petitioners cite, the political branches of government declined to spend federal money; Cross-Petitioners provide no example where the courts struck down a spending program as exceeding the scope of Congress' powers. None exist. *See* Chemerinsky, *supra* n.4, at 105 n.5.

Finally, Cross-Petitioners never advanced these historical arguments or argued that the spending power is limited to enumerated Article I fields before the court of appeals. Their arguments should not be considered for the first time here.

## III. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT RLUIPA PROMOTES THE GENERAL WELFARE AND DOES NOT ENCROACH UPON LOCAL CONCERNS

Cross-Petitioners contend that review is warranted because RLUIPA encroaches on areas of local concern and interferes with the states' police power. As discussed above, however, this Court has long recognized that Congress has broad power to condition federal funds upon compliance with its legislative policy directives, including anti-discrimination policies, *see Davis*, 526 U.S. at 649-50, and that Congress enacted RLUIPA based on well-documented evidence that "'frivolous or arbitrary'" barriers impeded institutionalized persons' free religious exercise. *Cutter*, 544 U.S. at 716. RLUIPA effectuates validly enacted federal legislative policy to protect fundamental rights; it does not regulate the operation of state prisons and local affairs.

The federal government has the power under the Supremacy Clause to ensure compliance with federal law. While Congress cannot force the states to enact or administer a federal regulatory scheme, the Spending Clause and the Commerce Clause are treated differently with respect to traditional Tenth Amendment and federalism concerns. Because Congress can regulate indirectly under the Spending Clause that which it cannot regulate directly under the Commerce Clause, and because states retain the ultimate power and choice to decline participation in the federal programs, state sovereignty is preserved.

In *Dole*, this Court observed that "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions placed on federal grants." *Dole*, 483 U.S. at 210. To the contrary, the Court stated that conditions on funding do not intrude on state sovereignty precisely because they leave each state with "the 'simple expedient' of not yielding to what [the state] urges is federal coercion." *Id.* (citing *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947)).

This Court's post-*Dole* decisions did not alter the constitutional calculus. Unlike *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), RLUIPA does not commandeer state governments into service for a regulatory purpose. As the Sixth Circuit in *Cutter*, 423 F.3d at 589, held, RLUIPA does not require the states to enact or administer any federal program. It does not require the states to take any affirmative action at all. Instead, "RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion, unless the states' actions are the least restrictive means of furthering a compelling governmental interest." *Id.*; *compare Reno v. Condon*, 528 U.S. 141, 144, 151 (2000) (upholding federal statute prohibiting states from disclosing drivers' personal information where statute did not require states to enact federal laws or regulations or assist in enforcement).

Cross-Petitioners' reliance on this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598

(2000), striking federal legislation as beyond Congress' Commerce Clause power, is misplaced. As discussed, Congress's power to condition funds pursuant to its spending power is broader than and distinct from its power to regulate directly under the Commerce Clause. In *New York*, this Court expressly recognized the power of Congress, through its spending authority, to induce states to do what could not be compelled through the commerce power. *See* Chemerinsky, *supra* n.4, at 101.

As Justice O'Connor wrote in distinguishing the two powers in *New York*, 505 U.S. at 166-67:

> This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . First, under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds,' . . . Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.

*Id.* (quoting *Dole*, 483 U.S. at 203 (citations omitted)); *see also Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

Moreover, unlike the sweeping and potentially unlimited legislation at issue in *Lopez* and *Morrison*, RLUIPA, by its terms, is limited to substantially burdensome infringements, and even those burdens can be justified (and thus exempted from liability under RLUIPA) where the state's actions are the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1. Not only can states opt out of RLUIPA (an option not available in *Lopez* or *Morrison*), but RLUIPA provides that participating states can avoid the preemptive force of the statute by changing their policies and practices in a manner that eliminates the substantial burden, or by retaining their policies and exempting the substantially burdened religious exercise. 42 U.S.C. § 2000cc-3(e). The absence of similar, or any, limiting principles was a driving force in *Lopez* and *Morrison*.

Unlike the "unlimited Commerce Clause authority rejected in *Lopez*," Cross-Pet. at 23, the validity of RLUIPA is constrained by the restrictions in *Dole*. More fundamentally, compliance is not mandatory and is ultimately subject to rejection by the states. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 241 (1990); *see also Cutter*, 544 U.S. at 733 (stating that "the States' voluntary acceptance of Congress' condition undercuts Ohio's argument that Congress is encroaching on its turf") (Thomas, J., concurring).

Prison officials are not commandeered. To the contrary, this Court recognized in *Cutter* that Congress, in enacting RLUIPA, expressly anticipated that "courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 146 Cong. Rec. at S7775; *Cutter*, 544 U.S. at 722-23 (noting "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions" and stating "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns"); *see id.* at 725-26 (noting "'the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners,'" and that "[t]he Congress that enacted RLUIPA was aware of the Bureau's experience") (citation omitted).

RLUIPA does not, as Cross-Petitioners suggest, contemplate "[a]bject deference" to Congress' policy determinations, nor have the lower courts turned a blind eye to *Dole*. Cross-Pet. at 23. As demonstrated above, the courts of appeals have thoughtfully and correctly applied the *Dole* factors. What Cross-Petitioners seek, in effect, is to overrule or profoundly limit *Dole*, to impose a judicial limitation on Congress' constitutional power to condition federal

funds and its concomitant power to make legislative policy judgments on how to promote the general welfare, and to limit the scope of the Spending Clause to Article I's enumerated fields.[5]

*Dole* remains the law of the land, under which Congress' judgment that RLUIPA promotes the general welfare merits substantial deference—deference of such a profound nature and degree that this Court has questioned whether it is judicially enforceable. *Dole*, 483 U.S. at 207 n.2. A statute designed to protect First Amendment values against substantially burdensome interference is certainly one that promotes the general welfare. Like legislation that conditions federal funds on compliance with analogous antidiscrimination provisions on the basis of race (42 U.S.C. § 2000d), gender (20 U.S.C. § 1681(a)), disability (29 U.S.C. § 794), and age (42 U.S.C. § 6102), RLUIPA protects the integrity of important civil rights by ensuring that substantial burdens are not imposed on religious exercise. This Court has recognized the propriety of promoting core constitutional values in legislation like RLUIPA. *Smith*, 494 U.S. at 890; *see also Cutter*, 544 U.S. at 719.

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[5] Even if these were cognizable grounds for review, these particular challenges were not advanced in or passed on by the court of appeals. Even on the question of whether RLUIPA unduly interferes with the operation of local prisons, there is no evidence in the record below to evaluate whether in fact RLUIPA undermines state affairs. Judgment on that issue should be reserved for a case that allows consideration of evidentiary facts.

Cross-Petitioners contend that deference to the political branches in crafting Spending Clause legislation is too broad, but they fail to articulate a workable standard for governing judicial limitations on Congress' policy judgments concerning what is in the general welfare, as opposed to what interferes with "traditional" state activities. History shows that there is good reason for judicial deference to Congress in this context. In overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had held that the Tenth Amendment prevents Congress from interfering with "integral" or "traditional" state activities, this Court cited as a primary reason for its decision the impossibility of judicially defining what constitutes "integral" and "traditional" state functions: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is 'integral' or 'traditional.'" *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). Arguing in favor of judicial restraint, Justice Blackmun stated: "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Id.* at 546.

The Court's reasoning in *Garcia* applies with equal force here. Judicially imposed constraints on the exercise of Congress' legislative judgment to determine what promotes the general welfare would inevitably call for normative line-drawing in a manner

that the Constitution does not contemplate. *See* Chemerinsky, *supra* n.4, at 102-04. Requiring courts to distinguish between the local and national welfare would involve the kind of indeterminate, policy-driven analysis that has proven unenforceable in the past. Cross-Petitioners contend that RLUIPA should be characterized as a form of prison administration, which, to them, is a matter of local concern. However, RLUIPA is more accurately described as a civil rights statute intended to protect the religious liberty of members of minority faiths. The civil rights of minorities have been a matter of national concern and welfare since 1868, and cannot seriously be considered merely a matter of state or local concern.

Indeed, RLUIPA has international as well as national implications. The rights of the imprisoned, the accused and the detained are most certainly a matter of international concern today. United States foreign policy initiatives to promote religious liberty and tolerance in other countries would obviously be undercut by a failure to protect the religious liberty of minority faiths at home in our own institutions.

Cross-Petitioners advocate for a standard of judicial enforcement that has not had the benefit of evaluation and development in the lower courts. Cross-Petitioners fail to articulate how this new standard is supposed to work, and where, exactly, the line between local and national is to be judicially drawn. This Court should not reach out to craft a new Spending Clause standard that has not been thoroughly adjudicated and tested in the lower courts.

In sum, *Dole* remains the controlling law on conditional grants of federal money. Cross-Petitioners seek a return to a pre-*Butler* reading of the Spending Clause—a reading this Court has expressly rejected—and, in so doing, seek to effectively overrule 75 years of Spending Clause jurisprudence. Just one year after the Hamiltonian view was adopted, this Court was unwilling to "resurrect the contest." *Helvering*, 301 U.S. at 640 ("It is now settled by decision. The conception of the spending power advocated by Hamilton . . . has prevailed over that of Madison."). Cross-Petitioners' rule would invalidate substantial modern spending legislation and render the Spending Clause a "mere tautology" by limiting Congress' power to Article I's enumerated fields. *Butler*, 297 U.S. at 65.

Cross-Petitioners have failed to point to a single case where this Court struck federal legislation on Spending Clause grounds, and they have failed to articulate cognizable grounds for certiorari. *Lopez* and *Morrison* involved distinct Article I powers, and were not subject to the same limiting principles RLUIPA engenders. They are inapposite.[6] *See, e.g., Sabri v. United States*, 541 U.S. 600, 607-08 (2004) (declining to apply *Lopez* and *Morrison* on grounds that those

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[6] Even in areas that implicate traditional areas of "local" concern, Congress can regulate pursuant to the Commerce Clause, and judicially enforceable limits on federal power are constrained. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding constitutionality of Controlled Substances Act as applied to non-commercial intrastate possession and consumption of medical marijuana as authorized by California law).

decisions do not control where regulation falls within Congress' spending power). If South Dakota objects to refraining from prison practices that substantially burden religious exercise, then South Dakota can say no to federal funds.[7] But it should not be permitted to take federal money and, at the same time, contend that Congress has unduly interfered with its local affairs.

## CONCLUSION

For the reasons above, the conditional cross-petition for a writ of certiorari should be denied.

Dated: April 16, 2010

Respectfully submitted,

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[7] Allowing the states to decide for themselves whether to accept federal funds, and thus whether to support federal policy choices, does far more to preserve state sovereignty than a rule that vests that choice, preemptively and categorically, with the federal courts. *See Oklahoma v. Civil Serv. Comm'n*, 330 U.S. at 143-44 (spending power does not violate state sovereignty).

RECORD
AND
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No. 09-953

In The

# Supreme Court of the United States

TIM REISCH, *et al.*,

*Cross-Petitioners,*

v.

CHARLES E. SISNEY; JAMES DEAN VAN WYHE; and UNITED STATES OF AMERICA,

*Cross-Respondents.*

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## Cross-Petitioners' Reply Brief in Support of Conditional Cross-Petition for a Writ of Certiorari

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## QUESTION PRESENTED

1. Whether federal spending for state prisons violates the "general Welfare" limitation of the Spending Clause, and this Court's precedent in *United States v. Butler* and *South Dakota v. Dole*, because it constitutes spending for local, rather than national purposes, and because it intrudes upon the states' police power, which is a core function of government, traditionally reserved to the states?

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## REASONS FOR GRANTING THE WRIT

### I. The Lack of a Circuit Split Is Not Grounds For Denying Certiorari When The Circuit Courts Have Decided An Important Issue Of Federal Law Either Contrary To Prior Decisions Of This Court Or As Yet Undecided By This Court.

Neither Respondent identifies any problems with this case serving as a vehicle for addressing the significant constitutional question presented by the cross-petition for writ of certiorari.[1] Rather, Respondents the United States and Charles Sisney both

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[1] Sisney does contend that because the petition includes historical references not cited below, certiorari is not warranted. Sisney BIO, at 28. This Court considers whether the *issue* was raised below, not whether all of the arguments in support of the issue were marshaled. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). There is no question that the issue whether RLUIPA was a valid exercise of Congress' spending power was properly raised and also decided below. Pet. App. 14a. Sisney further contends that the cross-petition argues that the Spending Power is limited to advancing the other powers delegated to Congress in Article I, Section 8 of the Constitution, which he contends was not only not raised below but is foreclosed by this Court's decision in *United States v. Butler*, 297 U.S. 1 (1936). *Id.* at 28, 34 n.5. Sisney misunderstands the argument in the cross-petition, which is ultimately based not on the Madisonian view of the Spending Power rejected in *Butler*, but on the Hamiltonian view adopted in *Butler*. Cross-Pet. at 19-20. Hamilton recognized that spending must be "general, and not local." *Butler*, 297 U.S., at 67. That point was pressed by cross-petitioners below, but rejected. Pet. App. 16a. It is required by *South Dakota v. Dole*, 483 U.S. 203 (1987), and, more explicitly, by *Helvering v. Davis*, 301 U.S. 619 (1937). There is no vehicle problem here.

contend in their respective briefs in opposition that the decision of the Eighth Circuit was correct and that, "[a]bsent a split among the circuits, ... review by this Court is not warranted." Brief in Opposition of Respondent Sisney ("Sisney BIO") at 22; *see also* Brief of the United States in Opposition ("U.S. BIO") at 4 (contending that lack of a circuit split is alone a sufficient reason to deny the petition). There is of course another ground for considering certiorari, recognized by Respondent Sisney but not addressed by Respondent United States, namely, that this Court will consider granting certiorari when a lower court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Contrary to Respondent Sisney's assertion, both of those grounds pertain here.

The United States notes that six Circuit Courts of Appeal have upheld Section 3 of RLUIPA as a valid exercise of Congress' Spending Power, but none of those courts have given the matter serious treatment. Indeed, in two of the cases, the argument that the federal spending at issue exceeded Congress' power to spend for the "general welfare"—the first necessary element articulated by this Court in *Dole* and the only element challenged by this cross-petition—was not raised by the parties and therefore not addressed by the courts in any but the most conclusory manner. *See Cutter v. Wilkinson*, 423 F.3d 579, 585 (6th Cir. 2005) ("The prison officials do not explicitly contend that RLUIPA violates the first *Dole* limitation"); *Benning v. Georgia*, 391 F.3d 1299,

1305 (11th Cir. 2004) (the state "does not dispute that RLUIPA serves the general welfare").

The analysis by the circuit courts in cases where the issue was raised by the state is no more substantial. In *Madison v. Virginia*, the Fourth Circuit's analysis of Virginia's Spending Clause challenge consists of a single sentence:

> Here, Congress sought to protect prisoners' religious liberty from unjustified and substantial burdens, *see Cutter*, and we have no trouble concluding that RLUIPA's "attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare." *Charles*.

474 F.3d 118, 125 (4th Cir. 2006). The Seventh Circuit's analysis in *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), is but a single paragraph, most of which is devoted to summarizing the Ninth Circuit's two-paragraph decision in *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002). The opinion closes with the same *ipse dixit* relied upon by the Fourth Circuit:

> Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority.

348 F.3d, at 607. *See also Mayweathers*, 314 F.3d, at 1066 ("protecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare"). Although not cited by the United States, the Fifth Circuit has also concluded that Section 3 of RLUIPA "was passed pursuant to the Spending Clause," without any analysis whether it was valid under that clause. *Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009), *petition for certiorari filed*, 77 USLW 3657 (May 22, 2009) (NO. 08-1438).

Only in the first of these cases—the Ninth Circuit's decision in *Mayweathers*—was a petition for certiorari even filed. *Alameida v. Mayweathers*, 540 U.S. 815 (2003). The States did not seek certiorari in *Madison*, *Cutter*, *Charles*, or *Benning*, and the Spending Clause challenge is not at issue in the petition for certiorari pending before this Court in *Sossamon*. In short, the circuit courts are well on their way to having completely decided an important issue of federal constitutional law that either conflicts with the prior decisions of this Court in *Dole*, *Helvering*, and *Butler* or, at the very least, has not been decided by this Court but ought to be. That a seventh circuit court has now weighed in on the issue, "adopt[ing] the reasoning set forth in those cases [scant as it was] *with little to add*," Pet. App. 14a, strengthens rather than weakens the argument for granting the petition for a writ of certiorari in this case. There is very little percolation of the issue yet to be had.

## II. The Circuit Courts Have Misconstrued *Dole* And The Cases Upon Which It Relies.

From what little analysis there has been regarding the Spending Clause challenge to RLUIPA, it is clear that the lower courts have uniformly made two fundamental errors in how they have applied the first prong of this Court's analysis in *Dole*. First, they have focused exclusively on the conditional regulations rather than on the underlying spending, and second, they have deferred to Congress not just on what constitutes "welfare," but on whether that welfare is "general" or "local." Those analytical errors, perhaps grounded in ambiguity in this Court's decision in *Dole*, warrant review and correction by this Court, less a critically importation limitation on the power of Congress be rendered null.

### A. The federal spending program, not just the regulatory conditions, must further the "general welfare."

The first fundamental error committed by the circuit court below (and by the other courts it followed) is in looking exclusively at whether the *regulations* contained in RLUIPA further the general welfare, whereas the *Dole* analysis requires that the *spending* to which the regulations are attached also be in furtherance of the general welfare. As the Solicitor General herself recognizes, RLUIPA is not a spending statute, but one that ties new regulations to previously enacted spending statutes. U.S. BIO, at 6. By focusing exclusively on whether RLUIPA, rather than federal spending on state prisons, furthers the general welfare, the courts below have misapplied *Dole*, in which this Court looked first to "whether a

particular *expenditure* is intended to serve general public purposes . . . ." 483 U.S., at 207 (citing *Helvering*, 301 U.S., at 640, 645) (emphasis added).

As the citation to *Helvering* makes clear, the first focus must be on the spending itself rather than on the conditions attached to the spending. *See Helvering*, 301 U.S., at 640 ("Congress may *spend money* in aid of the 'general welfare'") (emphasis added); *id.*, at 645 (discussing "[w]hen money is spent to promote the general welfare"); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare"); *Butler*, 297 U.S., at 64 ("The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted").

Because there was no question in *Dole* that the "general" or national welfare was furthered by federal spending for the *interstate* highway system, which was the federal spending underpinning the national drinking age regulation at issue in the case, the *Dole* Court proceeded directly to consider whether the drinking age regulations themselves furthered the general welfare. *Dole*, 483 U.S., at 208. There is no suggestion in *Dole* that this Court was eliminating the need for the underlying spending to also be in furtherance of the "general welfare" as a necessary precondition for conditional regulation tied to that spending. That would have overruled *Helvering* and *Butler*, and as this Court has frequently cautioned, it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v.*

*Illinois Council on Long Term Care*, 529 U.S. 1, 17 (2000).

### B. Deference to congressional determination of "welfare" does not negate the need to draw a line between "general" and local welfare.

The second error committed by the lower courts is in assuming that the nearly unconstrained deference the *Dole* Court gave to Congress to determine what qualifies as "welfare" also extends to whether that welfare is in the "general" or "national" as opposed to merely "local" or "particular" welfare. *Compare Dole*, 483 U.S., at 208 ("the concept of *welfare* or the opposite is shaped by Congress") (emphasis added) *with Cutter*, 423 F.3d, at 585 ("In *Dole*, the Supreme Court instructed the lower courts to "defer substantially to the judgment of Congress" in deciding what constitutes "the general welfare," going so far as to suggest that the "general welfare" restriction might not be "judicially enforceable . . . at all") (internal citations omitted).

The confusion of the lower courts is perhaps understandable because *Dole* itself used the terms "general welfare" and "welfare" somewhat interchangeably, and only gave a nod to the issue under consideration here by citation to *Helvering*. Nevertheless, the issue is critically important to the meaning of the Spending Clause and to the very idea of limited government reflected in our Constitution and so frequently given voice by this Court. What qualifies as "welfare" in the "general welfare" formulation may well be a judicially unenforceable line, *see Dole*, 483 U.S., at 207 n.2, but whether something is na-

tional or instead merely local in scope certainly is not. "The line must still be drawn between one welfare and another, between particular and general." *Helvering*, 301 U.S., at 640-41 (cited in *Dole*, 483 U.S., at 207).

Spending for the "particular" or local welfare is unconstitutional, while spending for the "general" or national welfare is permissible. Although the *Helvering* Court said it would defer to Congress on close questions—the "middle ground" or "penumbra" between the two—it did not abdicate its responsibility of enforcing the constitution's prohibition on spending for the "particular" welfare, where "the choice" by Congress "is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.*, at 640.

That responsibility was abdicated by the court below, however, when it afforded unconstrained deference to Congress to determine both components of the "general welfare" limitation on the spending power, failing to even consider, much less draw, a line between "general" and "local" welfare. Sisney himself contends that such line-drawing is something "that the Constitution does not contemplate," Sisney BIO, at 36, yet for that proposition he cites a law review article by Professor Erwin Chemerinsky, not this Court's governing precedent in *Helvering* to the contrary. The unconstrained deference to the exercise of congressional power advocated by Sisney would result in no limitation on the power whatsoever, a theory of the Constitution that has repeatedly been rejected by this Court. *See, e.g.*, *Dole*, 483 U.S., at 207 ("The spending power is of course not unlimited"); *Butler*, 297 U.S., at 66 ("the power to spend

[is] subject to limitations"); *cf. United States v. Lopez*, 514 U.S. 549, 556 (1995) (noting that even the "modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits").[2]

Spending for local prisons may well be the quintessential program that is local and not national. State prisons do not move in interstate commerce nor do they affect other states, and their operation is one of the most core aspects of state sovereignty. If "[t]he line must still be drawn between one welfare and another, between particular and general," as *Helvering* says that it must, the lower courts in abandoning that line have "decided an important federal question in a way that conflicts with relevant decisions of this Court," or at the very least have "decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). Certiorari is certainly warranted to address whether the line that *Helvering* said "must be drawn" has properly been abandoned by the lower courts.

Respondent Sisney concedes that the lower courts have not attempted to draw the line between local and national. Sisney BIO, at 36. But far from counseling against review by this Court, that acknowledgement of the lower courts' failure to comply with

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[2] Sisney misunderstands our reliance on Commerce Clause precedents. Sisney BIO, at 31-32. The position we advanced is not that Congress cannot use conditional spending to regulate ends beyond the other enumerated powers, but rather that the Spending Clause itself, like the Commerce Clause, contains limits on federal power. Cross-Pet. at 5-8.

*Helvering* compels review so that this Court can at least reassert that the line "must be drawn," clarifying any ambiguity in *Dole* that has led to contrary interpretations of the Spending Clause. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002) (noting that certiorari was granted in part "to resolve any ambiguity" in this Court's own opinions). Because the federal spending at issue here is so quintessentially local and intrudes on such a core aspect of state sovereignty as the management of state prisons, *Preiser v. Rodrigeuz*, 411 U.S. 475, 491–92 (1973), more than that should not be required, but if it is, a remand for line-drawing in the first instance by the lower courts would be the appropriate outcome, not a denial of certiorari.[3]

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[3] Sisney urges the Court to await a case until interference with core state sovereignty has been developed via evidentiary facts. Sisney BIO, at 34 n.5. Intrusions on something as core a function of state sovereignty as the running of a state prison should not require an evidentiary record. *Res ipsa loquitur*.

## CONCLUSION

For the reasons noted above and previously in the cross-petition, this Court should grant the cross-petition for writ of certiorari and use this case as an opportunity to clarify the scope and enforceability of the limits on Congress' Spending Clause power.

Respectfully submitted,

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